Supreme Court, U.S.
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90-244
No. ———

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1990

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MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY,
*Petitioner,*

v.

WILLIAM E. COLLINS,
*Respondent.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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## QUESTIONS PRESENTED

1. Does a jury award of punitive damages violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution where there was no proof of actual damages and where state law provided no meaningful standards for the jury's discretion to "determine the severity of punishment"?

2. Does a jury award of punitive damages violate the Fourteenth Amendment where the award would be excessive under any applicable standard and where the award rests entirely on *respondeat superior* with no showing that defendant participated in or even had knowledge of the conduct complained of?

## PARTIES TO THE PROCEEDING

Massachusetts Mutual Life Insurance Company *

William E. Collins

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* The following are non-wholly owned subsidiaries of the Massachusetts Mutual Life Insurance Company as well as companies that may be deemed affiliates thereof:

Bay Colony Life Insurance Company of Arizona
MassMutual Asset Management Company, Inc.
MassMutual of Ireland, Ltd.
MML Investors Services, Inc.
MML Real Estate Corporation
MML Realty Management Corporation
MML Syndicate, Inc.
MML Series Investment Fund
MassMutual Corporate Investors
MassMutual Participation Investors
MassMutual Integrity Funds

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## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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### OPINIONS BELOW

The opinion of the Supreme Court of Alabama, dated July 20, 1990, is reproduced as Appendix A of this petition. Pet. App. 1a-12a. The March 18, 1989 opinion of the Circuit Court of Marion County, Alabama, denying petitioner's motion for judgment notwithstanding the verdict or in the alternative for a new trial, is reproduced as Appendix B of this petition. Pet. App. 13a-17a.

### JURISDICTION

The judgment of the Supreme Court of Alabama was entered on July 20, 1990. Pet. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1257.

## CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

This case involves the Due Process Clause of the Fourteenth Amendment, United States Constitution. Pet. App. 22a.

## STATEMENT OF THE CASE

This case involves the constitutionality of a punitive damages award against an out-of-state corporation based on an alleged "fraud" in the sale of a life insurance policy. In May 1983, plaintiff William E. Collins, a bank vice-president, purchased an additional life insurance policy from Massachusetts Mutual Life Insurance Company (Mass Mutual) through an independent contractor agent, Thomas Smart. This policy was intended to supplement Collins' existing $15,000 life insurance policy from Mass Mutual, for which he was paying a monthly premium of $19.51 and which then had a cash value of between $1,500 and $1,800. Pet. App. 2a. Collins' new policy was in the amount of $85,000 and had an annual premium of $1,307.55. *Id.* Thus, the two policies gave Collins $100,000 in life insurance coverage with Mass Mutual.

Despite the substantial increase in his coverage, Collins had *no* increase in his monthly premium of $19.51. To accomplish this result, Collins executed an "Authorization-Use of Dividends" form at the time he applied for his new policy. This authorization directed that the dividends on the existing policy were to be applied toward the premiums on the new policy.[1] In addition, he elected that

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[1] On the "standing dividend order," signed by Collins on May 17, 1983, Collins checked a box directing Massachusetts Mutual

> [t]o surrender enough Paid-up additions or Dividend Accumulations under the policy(s) listed below to pay the annual premium due on the policy shown above. Paid-up additions and Dividend Accumulations will be surrendered under the policies listed below in ascending policy number order, beginning with the lowest policy number.

One policy number, apparently the number of Collins's existing policy, is written in the space below the quoted text.

dividends on the new policy be used to reduce premiums on that policy. Thereafter, on the first and second anniversaries of the new policy, Collins executed "Loan Certificates" which authorized payment of the annual premiums on the new policy through policy loans on the original policy. By utilizing dividends and policy loans in this fashion, Collins was able to obtain the additional $85,000 in coverage he desired without any additional monthly premium beyond the $19.51 he had been paying.

On October 3, 1986, nearly three and a half years after taking out the new policy and following the death of the independent contractor agent, Collins filed this action in the Circuit Court of Marion County, Alabama. In charging Mass Mutual with "fraud" in the sale of an insurance policy, Collins did not suggest that Mass Mutual had failed to provide him the insurance coverage he had desired. Nor did he surrender or otherwise repudiate the new policy. Rather, Collins alleged that he did not know that policy loans would be used to pay the premiums for the second policy despite the fact that he (a) was a bank executive, presumably capable of understanding the financing arrangement by which his coverage increased from $15,000 to $100,000 without a premium increase, and, indeed, (b) had executed documents specifically authorizing that arrangement.[2] The jury ultimately found in his favor on this "fraud" claim and, after being charged on the availability of punitive damages, returned a verdict of $750,000 against Mass Mutual. Pet. App. 18a. Because no actual damages had been proved,[3] it

[2] At trial, Mass Mutual was not permitted to introduce into evidence an initial letter sent by the agent to Collins on May 9, 1983, which explained the proposed arrangement, referring specifically to "leveraging". The Alabama Supreme Court held that the exclusion of this evidence was "error", but "harmless". Pet. App. 9a.

[3] At trial, Collins claimed no out-of-pocket loss and alleged only that he had been "damaged" to the extent of policy loans that he

must be inferred that the entire award of $750,000 represented punitive damages.

Mass Mutual promptly moved for judgment notwithstanding the verdict or in the alternative for a new trial. It contended, *inter alia*, that the award violated due process under the United States Constitution because Alabama law provided no standards to guide the jury's discretion in awarding punitive damages and because the punitive damages were based solely on the activities of the agent. Pet. App. 19a. The trial court denied the motion. Pet. App. 13a.

Mass Mutual appealed to the Supreme Court of Alabama, again arguing, *inter alia*, that the award violated due process under the United States Constitution. On April 2, 1990, during the pendency of the appeal, this Court granted certiorari in *Pacific Mutual Life Insurance Co. v. Haslip*, 553 So. 2d 537 (Ala. 1989). *See* —— U.S. ——, 110 S. Ct. 1780 (1990). That case, like this one, involves a due process challenge to an award of punitive damages.

On July 20, 1990, the Supreme Court of Alabama affirmed the judgment of the trial court, characterizing the due process claim as "similar" to that rejected "without discussion" in *Haslip*. Pet. App. 10a. Without explanation, the Court stated that the damages award "was not excessive" and that the trial court had "applied the guidelines" for punitive damages awards previously enunciated in *Hammond v. City of Gadsden*, 493 So. 2d 1374 (Ala. 1986).[4] Pet. App. 11a. The Court did not address

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had not been informed of and interest on such loans, a temporary and self-liquidating sum. The jury made no specific finding of actual damages.

[4] The *Hammond* "guidelines" to which the Court referred govern the decision-making of the trial judge in reviewing a jury award of damages, rather than the decision-making of the jury itself:

> Our cases reflect a number of factors which are appropriate for the trial court's consideration: The culpability of the de-

Mass Mutual's argument as to the constitutionality of punitive damages based on *respondeat superior*. Justice Houston filed a specially concurring opinion pointing out the need for "meaningful standards" in assessing punitive damages. Pet. App. 11a. Justice Maddox, concurring only in the result, argued that Alabama law concerning punitive damages "fails to guarantee to defendants the 'fundamental fairness' that the Constitution requires." Pet. App. 12a.

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> fendant's conduct [citation omitted]; the desirability of discouraging others from similar conduct [citation omitted]; the impact upon the parties [citation omitted]. These are by no means exclusive. Justice may well require the consideration of other factors, such as the impact on innocent third parties. We make no attempt to enumerate all the factors which may be considered by the trial court. We instead leave that to its sound discretion. We do emphasize, however, that only where the record establishes that the award is excessive or inadequate as a matter of law, or where it is established and reflected in the record that the verdict is based upon bias, passion, corruption, or other improper motive may a court order a new trial or remittitur.

493 So. 2d at 1378. The Alabama Supreme Court has elsewhere stated:

> Punitive damages need bear no particular relationship to actual damages. [Citations omitted.] Furthermore, punitive damages will not be disturbed unless they are so excessive that they shock the judicial conscience or are so excessive as to indicate passion or prejudice on the part of the trier of fact. [Citations omitted.] The damages in this case were not so excessive as to shock the judicial conscience or to indicate passion or prejudice on the part of the trier of facts.

*Yesterday's, Inc. v. Lamey*, 492 So. 2d 988, 990 (Ala. 1986).

## REASONS FOR GRANTING THE WRIT

### I. THIS COURT HAS REPEATEDLY RECOGNIZED THE EXCEPTIONAL IMPORTANCE OF THE ISSUES PRESENTED IN THIS CASE AND IN *HASLIP* CONCERNING THE DUE PROCESS LIMITS ON PUNITIVE DAMAGE AWARDS

In granting the writ of certiorari in *Pacific Mutual Life Insurance Co. v. Haslip, supra*, this Court recognized that the constitutionality of punitive damage awards under the Due Process Clause presents an important issue warranting this Court's consideration. That issue is sufficiently important to justify a grant of certiorari in this case, as well. By ordering an expedited briefing schedule in this case, or by postponing oral argument in *Haslip* to permit normal briefing in this case, this Court would be able to consolidate both cases for argument, consideration and decision. Such a result would ensure not only a fuller development of this question than would be possible with the *Haslip* case alone,[5] but also, that this important question does not elude this Court's consideration once again.

The significance of the issue presented is clear from prior cases of this Court. In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), the Court held punitive damages unconstitutional in an entire category of cases. That case invalidated an award of punitive damages for defamation where liability was not based on a showing of knowledge of falsity or reckless disregard for truth. *Id.* at 349. Although the Court's holding stemmed from the potential threat to First Amendment freedoms posed by punitive damage awards in defamation actions, the Court also expressed a concern about punitive damages generally: "In most jurisdictions jury discretion over the amounts awarded is limited only by the gentle rule that they not

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[5] Oral argument in the *Haslip* case is currently scheduled for October 3, 1990.

be excessive. Consequently, juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused." *Id.* at 350.

In *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986), the Court granted certiorari to review a number of constitutional challenges to the Alabama law of punitive damages. However, the Court ultimately determined that it was inappropriate to reach those questions there in light of other defects which required that the decision below be vacated.[6] Nonetheless, the Court made clear that the due process challenge and an Eighth Amendment challenge "raise important issues which, in an appropriate setting, *must* be resolved." *Id.* at 828-29 (emphasis added).

Similarly, in *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71 (1988), the Court declined to reach a due process challenge to a punitive damage award, finding that the argument had not been raised below. *See id.* at 76-77. The concurring opinion of Justice O'Connor observed, however, that the due process issue "is worthy of the Court's attention in an appropriate case," *id.* at 87, and that the "grant of wholly standardless discretion to determine the severity of punishment appears inconsistent with due process," *id.* at 88. Nonetheless, because the petitioner had raised the issue belatedly, Justice O'Connor agreed that "[t]his due process question, serious as it is, should not be decided today." *Id.*

Most recently, in *Browning-Ferris Industries v. Kelco Disposal, Inc.*, —— U.S. ——, 109 S. Ct. 2909 (1989), the Court's efforts to resolve the constitutionality of punitive damages under the Due Process Clause were frustrated because the issue had not been preserved below.

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[6] The Court in *Aetna Life Insurance* did not reach the various constitutional objections to the award because the Court found that due process required a judicial disqualification in the lower court and therefore vacated the decision of the court below.

*See id.* at 2921. Significantly, four members of the Court, in two concurring opinions, expressed doubt as to the permissibility under the Due Process Clause of punitive damages assessed by juries with minimal guidance. *See id.* at 2923 (Brennan, J., concurring); *id.* at 2924 (O'Connor, J., concurring in part and dissenting in part).

As the Court's prior actions in this area make clear, the issues presented by this case are of the highest constitutional significance and deserve prompt and thorough attention. To date, they have not been reviewed for a variety of reasons wholly unrelated to their merits. By granting certiorari and consolidating this case for argument with *Haslip*, this Court will have an opportunity not only to resolve those issues at long last, but also, to resolve them on the basis of a broader factual record.

## II. THIS IS AN APPROPRIATE CASE FOR RESOLVING THE ISSUES PRESENTED

This case provides an ideal opportunity for consideration of the issues presented. As in many cases involving punitive damages, the jury instructions here provided no meaningful standards to guide the jury in determining whether to award punitive damages, and, if so, in what amount.[7] The jury was instructed that "[t]he imposition of punitive damages is entirely discretionary . . . . Should you award damages, in fixing the amount you must take into consideration the character and degree of wrong as shown by the evidence in the case and the necessity of preventing similar wrongs." Pet. App. 21a. This language provides no more guidance than the instruction which Justice Brennan found objectionable in his concurrence in *Browning-Ferris*.[8]

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[7] The relevant portion of the jury instructions is reproduced at Pet. App. 21a.

[8] Justice Brennan quoted the instruction given to the jury on punitive damages in *Browning-Ferris Industries*: " 'In determining the amount of punitive damages, you may take account of the

Moreover, even if Collins had been injured, there was no evidence that Mass Mutual participated in that injury. The conduct complained of was solely that of the independent contractor agent who sold the policy; there was no evidence that Mass Mutual directed, ratified, or even knew of the agent's "wrongful" activities. This is a variation of the *respondeat superior* issue in *Haslip* where the agent was acting for another non-defendant principal; in this case, the agent was acting nominally for the defendant. This important distinction means that this case is deserving of review on certiorari, no matter how *Haslip* is decided.

Finally, this case highlights the unpredictable and oppressive nature of punitive damages awards. As noted earlier, there was no specific finding that Collins suffered any actual damages from the alleged "fraud" perpetrated upon him. Nor could there have been since Collins got precisely what he sought in purchasing the additional policy—higher insurance coverage for exactly the same premium. Because he has never disavowed the expanded coverage, he would presumably still claim that benefit today. Nonetheless, the jury awarded him $750,000. Pet. App. 18a. This case is thus distinguishable from *Haslip*, where the plaintiff suffered actual harm. Because there were *no* actual damages here, the punitive damages award bears *no* relationship to any "harm" suffered. The lower court's sanction of a punitive damages "multiplier" equal to infinity would raise serious due process issues, even if this Court were to affirm the *Haslip* decision.

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character of the defendants, their financial standing, and the nature of their acts.'" 109 S. Ct. at 2923. Justice Brennan characterized the instruction as "scarcely better than no guidance at all." *Id.*

## III. GRANTING THE PETITION WILL INSURE FULLER CONSIDERATION OF THE ISSUES PRESENTED IN *HASLIP*

Although this case includes some of the same issues present in *Haslip*, there are significant differences as well. Consideration of the issues in both cases together will assist the Court's resolution of these important issues.

In *Haslip*, conduct of the agent was admittedly fraudulent, but was not in furtherance of the defendant's business and there was an issue as to whether the defendant knew or should have known of it. In this case, the agent was an independent contractor nominally representing Mass Mutual, and there was no evidence that Mass Mutual even had knowledge of the conduct complained of until after the independent contractor agent's death. Thus, this case presents more sharply than *Haslip* the threshold question whether *any* award of punitive damages would be consistent with the requirements of due process.

Further, the impact of the conduct complained of is radically different in the two cases. In *Haslip*, the plaintiff was seriously damaged when she was confronted with the bills for an expensive hospitalization after her health insurance had been terminated through no fault of her own. Here, Collins admittedly had no out-of-pocket expense and the only "damage" he claimed was a temporary obligation that would be eliminated in time without any increase in the premium he had been paying. Thus, this case presents a facet of the damages issue not present in *Haslip*, *i.e.*, may punitive damages be imposed consistent with due process where there has been no showing or finding of actual harm to the plaintiff?

Finally, this case presents the issue whether the punitive damages awarded were excessive with a dimension not present in *Haslip*. Where, as here, there is *no* finding of actual damages and a $750,000 award of punitive dam-

ages, there can be no reasonable relation between the two; the punitive damages are infinitely large in relation to the actual. This aspect also may contribute to the Court's perspective in dealing with the excessiveness of punitive damages under due process.

Because discretionary punitive damages have a long history and are found in the laws of many states,[9] this issue is entitled to the most thorough consideration on the broadest possible record. Granting certiorari here will assist the Court in achieving that purpose if this case is consolidated with *Haslip*. If that is not done, this case is entitled to consideration on its own.

## CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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[9] *See Browning-Ferris Industries*, 109 S. Ct. at 2922 n.24.

# APPENDICES

## APPENDIX A

THE STATE OF ALABAMA—
JUDICIAL DEPARTMENT
THE SUPREME COURT OF ALABAMA

SPECIAL TERM, 1990

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88-949

MASSACHUSETTS MUTUAL LIFE INSURANCE CO.

v.

WILLIAM E. COLLINS

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Appeal from Marion Circuit Court

(CV-86-166)

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[July 20, 1990]

PER CURIAM.

The plaintiff, Eddie Collins, sued Massachusetts Mutual Life Insurance Company for fraud, conspiracy to defraud, outrage, and fraudulent representations, all arising from the sale of an insurance policy. The jury returned a $750,000 verdict in favor of Collins; the trial court entered a judgment based on that verdict; and Massachusetts Mutual appeals.

FACTS

Eddie Collins obtained a $15,000 whole life policy from Massachusetts Mutual in 1967, when he was 19 years old

(policy #1). He timely paid the monthly premium of $19.51 over the years. In May 1983, Collins was approached by a Massachusetts Mutual agent, Tom Smart, regarding the purchase of additional life insurance. Policy #1 had an accumulated cash value of between $1,500 and $1,800 at that time.

Smart sent Collins a letter on May 9, outlining the proposed "update" program formulated by Smart for Collins (policy #2). This "update" program proposed that Collins purchase additional coverage in the amount of $85,000, increasing his total coverage to $100,000. The $1,307.55 annual premium for policy #2 was to be paid out of the dividends from policy #1 and policy #2 as well as out of loans drawn against the cash value of policy #1. *Collins contends that he was unaware that the accumulated cash value of policy #1 would be used to fund policy #2.* This fact is the heart of the alleged fraud. In his letter, Smart represented to Collins that no additional premiums would be needed to fund policy #2.

Smart met Collins for lunch at some point after the May 9 letter had been mailed. Collins brought along as an advisor Zadus Turner, an independent insurance agent who was an old friend of Collins. At this luncheon meeting, Smart produced spread sheets outlining the payment schedule for policy #2. Collins decided to purchase the additional coverage.

In June 1984, Collins received a bill for the premium on the new policy. Collins contacted Smart because, he says, he had thought that he would not need to make additional premium payments on policy #2. Smart sent Collins a form on June 18 that was captioned "Loan Certificate." Along with the form, Smart included a letter that stated that policy #1 was being "leveraged" to cover the premium for policy #2 and that "we are merely leveraging against future dividends." Collins completed the "Loan Certificate" and returned it to

Massachusetts Mutual. This entire procedure was repeated in 1985. Massachuetts Mutual agent Smart died shortly after the form was returned in 1985.

Upon receiving a bill for the premium on policy #2 in June 1986, Collins contacted a representative of Massachusetts Mutual, who explained that policy #2 was being funded by a series of loans against the cash value of policy #1. Collins sued Massachusetts Mutual.

Massachusetts Mutual makes several allegations of error.

I

Massachusetts Mutual argues that Collins's action was barred by the two-year statute of limitations. Code of Ala. 1975, § 6-2-3 provides:

> "In actions seeking relief on the ground of fraud where the statute has created a bar, the claim must not be considered as having accrued until the discovery by the aggrieved party of the fact constituting the fraud, after which he must have two years within which to prosecute his action."

Massachusetts Mutual contends that Collins knew or should have discovered the underlying facts constituting the alleged fraud at the time that the first loan certificate was issued in June 1984, over two years before suit was filed. It argues that Collins signed a form captioned "Loan Certificate," that the loan certificate was unambiguous, and that the word "loan" appeared 11 times in the document. Massachuetts Mutual contends that by virtue of having executed the loan certificate Collins was put on notice as early as June 1984 that the cash value of policy #1 was being used as collateral to finance policy #2.

Facts constituting fraud are considered discovered when they actually have been discovered or when they should have been discovered. *Gonzales v. U-J Chevrolet*

*Co.*, 451 So.2d 244 (Ala. 1984). It is ordinarily a jury question whether a party discovered or should have discovered a fraud earlier than the date claimed.[1] *Ratledge v. H & W, Inc.*, 435 So.2d 7 (Ala. 1983).

Collins contends that he was mislead by Smart into believing that the loan certificate applied only to the dividends. Collins testified that Smart repeatedly assured him that only dividends were leveraged, and that dividend leveraging was referred to in the May 9 letter from Smart to Collins.

In view of these facts, we believe that Collins presented at least a scintilla of evidence that he did not have notice of the fraud in June 1984. Therefore, the question of the time at which Collins should have discovered the fraud was properly before the jury.

II

Massachusetts Mutual argues that Collins was improperly allowed to introduce into evidence a letter from Smart to a third party. The letter was sent by Smart to Bill Fishburne, who was advising his law partner, Charles Sharp, regarding the purchase of life insurance. Smart was attempting to sell to Sharp a plan similar to the one he had sold to Collins. Although the letter used no names, Smart related the details of a plan that had been sold to another person. This other person was described as a 35-year-old male non-smoker, with an existing $15,000 policy purchased by him at age 19 for a monthly premium of $19.51. The letter also stated that this person had purchased $85,000 of additional coverage. An employee of Massachusetts Mutual acknowledged

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[1] We note that this case was filed on October 3, 1986; therefore, the "scintilla rule" of evidence applies. "[T]he scintilla rule requires that issues in civil cases must go to the jury if the evidence, or a reasonable inference therefrom, furnishes a glimmer or trace in support of an issue." *Alabama Farm Bureau Mut. Cas. Ins. Co. v. Haynes*, 497 So.2d 82, 85 (Ala. 1986).

that Collins was the only one of Smart's customers who fit the profile described in the letter.

The letter went on to describe the "dividend averaging" concept as well as the "dividend leveraging" concept at issue here. Massachusetts Mutual argues that the letter was irrelevant because it was sent to a third party. We cannot agree. Under the particular facts of this case, we believe that there was evidence presented from which the trial court could have determined that the letter was relevant. Not only did the profile match Collins perfectly, but also a Massachusetts Mutual employee acknowledged that Collins was the only one of Smart's customers who matched the profile. "Question of materiality, relevancy, and remoteness rest largely with the trial judge, and his rulings must not be disturbed unless his discretion has been grossly abused." *Ryan v. Acuff*, 435 So.2d 1244, 1250 (Ala. 1983).

We hold that the trial judge did not abuse his discretion in admitting the letter.

III

Massachusetts Mutual also argues that the trial court erred in allowing Sharp to testify concerning his transactions with Smart. Massachusetts Mutual first argues that Sharp's testimony is barred by the Dead Man's Statute. We disagree. In order for the Dead Man's Statute to apply and render a witness's testimony incompetent, four criteria must be met: (1) The testimony must concern a statement by or a transaction with a deceased person; (2) the estate of this deceased person must be affected by the outcome of the suit, or the deceased person must have acted in a representative relation with the party against whom such testimony is to be introduced; (3) the witness must have a pecuniary interest in the result of the suit; and (4) the interest of the witness must be opposed to the interest of the party against whom he is called to testify. See *Melvin v.*

*Parker*, 472 So.2d 1024 (Ala. 1985); *Stanley v. Hayes*, 276 Ala. 532, 165 So.2d 84 (1964); Ala. Code 1975, § 12-21-163.

Clearly, Sharp's testimony meets criteria (1), (2), and (4). Sharp testified as to statements made by a deceased person. Sharp's testimony was used against a party represented by the deceased, and Sharp's interest is opposed to that of Massachusetts Mutual as evidenced by a separate lawsuit filed by Sharp against Massachusetts Mutual. Criterion (3) is more problematic. Massachusetts Mutual argues that because a similar lawsuit filed by Sharp against Massachusetts Mutual was pending at the time of trial, Sharp had a pecuniary interest in the outcome of this suit. In order for a pecuniary interest to bar testimony, it must be present, certain, and vested, not uncertain, remote, or contingent. *City of Rainbow City v. Ramsey*, 417 So.2d 172 (Ala. 1982).

Massachusetts Mutal argues that because Sharp's case is pending in the same county, because the same attorneys are representing the parties, and because the case potentially will involve the same judge and witnesses, he has a direct pecuniary interest in the outcome of Collins's case. While we agree that the outcome of Collins's case may have an impact on Sharp's case, we cannot say that such a potential impact is present, certain, and vested. Sharp, therefore, does not have a direct pecuniary interest in the present case that would act to bar his testimony.

Massachusetts Mutual also contends that Sharp's testimony should not have been allowed because his transactions with Smart were significantly dissimilar from Collins's transactions with Smart. In order to admit other false representations in a fraud case, the other representations must be similar in nature to those alleged in the complaint, *Sessions Co. v. Turner*, 493 So.2d 1387 (Ala. 1986), and the transaction must be of substantially the same character, *Great American Ins. Co. v. Dover*, 221

Ala. 612, 130 So. 335 (1930). In the present case, Sharp had eight Massachusetts Mutual Life Insurance policies with a total face value of $131,000. Sharp's policies were not unencumbered; he had several loans outstanding against their value at the time he was approached by Smart. Sharp also testified that his secretary handled most of the details of the transactions. Massachusetts Mutual argues that these differences between Sharp's situation and Collin's disqualify Sharp from testifying. Collins points out that both Collins and Sharp had been longtime Massachuetts Mutual policyholders and had significant accrued cash values. Both were approached in 1983 by Smart and were sold "update" programs based upon a "stream of dividends." Both were told that they would receive additional insurance with no increase in their monthly premium, and both were shown income projections which later turned out to be false. Based upon this evidence, the trial court did not err in finding that Collins's and Sharp's transactions with Smart were substantially of the same character so as to allow Sharp's testimony. We find no error here.

IV

Massachusetts Mutual also argues that the trial court erred in refusing to admit the May 9 letter from Smart to Collins soliciting his business. Collins's objection to the introduction of the letter was based upon the Dead Man's Statute. Massachusetts Mutual argues, and we agree, that Collins was not in a position to assert the Dead Man's Statute. The Dead Man's Statute provides protection to the decedent's estate or its successors.

The Dead Man's Statute provides:

> "In civil actions and proceedings, there must be no exclusion of any witness because he is a party or interested in the issue tried, except that no person having a pecuniary interest in the result of the action or proceeding *shall be allowed to testify against*

> *the party to whom his interest is opposed as to any transaction with, or statement by, the deceased person whose estate is interested* in the result of the action or proceeding or when such decreased person, at the time of such transaction or statement, acted in any representative or fiduciary relation whatsoever to the party against whom such testimony is sought to be introduced, *unless called to testify thereto by the party to whom such interest is opposed or unless the testimony of such deceased person in relation to such transaction or statement is introduced in evidence by the party whose interest is opposed to that of the witness or has been taken and is on filed in the case.* No person who is an incompetent witness under this section shall make himself competent by transferring his interest to another.

§ 12-21-163 (emphasis added).

Although the wording of this section is not completely clear, it is clear enough that the statute is meant to protect the interests of the decedent from the testimony of the living concerning transactions that occurred between the deceased and the witness. In this case, the party, who for all intents and purposes represents the interests of the decedent, seeks to introduce a *letter from the deceased to the opposing party.*

> "The purpose [of the Dead Man's Statute] is to prevent the surviving party from having the benefit of his own testimony where, by reason of the death of his adversary, his representative is deprived of the decedent's version of the transaction or statement."

81 Am.Jur.2d *Witnesses* § 304 (1976).

Clearly, Collins cannot exclude the letter under the provisions of the Dead Man's Statute; therefore, the trial judge erred in refusing to allow the letter.

While it was error for the trial judge to exclude the letter from evidence, we do not believe that such error requires reversal. The illustrations attached to the letter were the same illustrations attached to the Sharp letter which was properly introduced into evidence. The text of the letter illustrated both dividend averaging and dividend leveraging. Concerning dividend averaging, the letter stated:

> "When a net premium is due, paid additions are surrendered to pay it. This *reduces* the value of your paid additions account. When dividends exceed the annual premium of your new coverage, this *increases* the value of your paid additions account." (Emphasis in original.)

Concerning dividend averaging, the letter provided:

> "When the cash value of paid additions is all used, you would then leverage current premium payments against future dividends by borrowing against policy guaranteed values. This, of course, would involve policy loans and loan interest. However, under dividend leveraging, the loan interest is *not paid*—you are still paying your same $19.51 a month. When the future dividends exceed the annual premium cost, the excess pay off the loan for you. You end up with greater coverage, greater cash value, and greater dividend income." (Emphasis in original.)

As discussed in part I, it is clear that the jury believed that Collins was mislead by Smart.

We hold that the error in failing to permit the introduction of the letter was, at most, harmless error. Rule 45, A.R.App.P.

V

Masachusetts Mutual contends that the trial court committed error in allowing Collin's counsel to read from documents not in evidence in formulating his questions.

Massachusetts Mutual argues that this type of questioning violated the best evidence rule and, in one instance, the Dead Man's Statute.

After reviewing the questions at issue, we are of the opinion that the questions requested information within each witness's personal knowledge. Such questions do not violate the best evidence rule. *Cuppa v. Upton*, 489 So.2d 544 (Ala. 1986).

Massachusetts Mutual also contends that some of the questions asked of Collins violated the Dead Man's Statute. These questions referred to a handwritten note from Smart to Collins that accompanied the loan certificates discussed earlier. Collins claims that Massachusetts Mutual's attorneys, during their cross-examination, opened the door and allowed Collins's attorney to question him on redirect concerning the accompanying note. We agree. The note repeatedly stated that Collins should not be alarmed and that the "game plan [was] intact."

Massachusetts Mutual, by extensively questioning Collins about the loan certificate, opened the door to questions concerning the accompanying note. The Dead Man's Statute is subject to waiver in cases where the deceased party's representative questions a witness concerning his transactions with the deceased. *Poston v. Gaddis*, 372 So.2 1099 (Ala. 1979). The trial court did not err on this issue.

VI

Lastly, Massachusetts Mutual argues that the award of $750,000 is excessive. Its contention is that the imposition of punitive damages violates the due process rights embodied in the United States Constitution. This Court dismissed, without discussion, a similar claim in *Pacific Mut. Life Ins. Co. v. Haslip*, 553 So.2d 537 (Ala. 1989). The United States Supreme Court has granted certiorari in that case.

We note that the trial court applied the guidelines found in *Hammond v. City of Gadsden*, 493 So.2d 1374 (Ala. 1986), and found that the damages award was not excessive. Upon review of the facts of this case, we likewise find that the damage award was not excessive.

Based upon the foregoing, the judgment of the trial judge is due to be affirmed.

AFFIRMED.

Hornsby, C.J., and Jones, Shores, Adams, Steagall, and Kennedy, JJ., concur.

Houston, J., concurs specially.

Maddox, J., concurs in the result.

HOUSTON, JUSTICE (concurring specially).

I concur with the majority opinion.

I have been singing from the hymnal used by Justice Maddox on the need for meaningful standards for jury and trial court assessment, and trial court and appellate review, of punitive damages since I have been a Justice on this Court. The phrase "meaningful standards" does not mean that the amount of punitive damages must be small, but only that the amount should be arrived at as a result of the party against whom such damages are assessed having been afforded procedural due process. The amount of punitive damages must reasonably relate to the wrong and the wrongdoer, or as W.S. Gilbert wrote and retired Justice Samuel A. Beatty did frequently quote:

> "To let the punishment fit the crime—
> "The punishment fit the crime; . . ."

*The Mikado* (1885).

MADDOX, JUSTICE (concurring in the result).

I concur in the result reached, but I continue to adhere to the view I expressed in a dissent in *Pacific Mut. Life Ins. Co. v. Haslip*, 553 So.2d 537 (Ala. 1989), that the United States Supreme Court will hold, on review of that case, that Alabama's scheme for the award of punitive damages fails to guarantee to defendants the "fundamental fairness" that the Constitution requires.

For over a decade I have questioned the process that this Court has used to award punitive damages in cases involving claims such as the one presented in this case, and I have suggested that the legislature—or this Court—should consider alternatives to an action against an insurance company for fraud or bad faith failure to pay a claim.

The award of $750,000 in this case, while three times more than the "cap" set in the so-called tort reform legislation (which does not apply in this case), is not substantially different from awards made in similar cases. It is on that basis that I concur in the result. Until the Supreme Court of the United States decides the "due process" question that is presented in *Pacific Mutual*, I will not know whether my prediction about the outcome of that case will be proven accurate. In the meantime, I see no useful purpose to be served by continuing to dissent when the bench and bar are duty bound to apply the law as expressed by a majority of this Court. Because of that, I concur in the result.

## APPENDIX B

IN THE CIRCUIT COURT
OF MARION COUNTY, ALABAMA

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Civil Action No. CV-86-166

---

WILLIAM E. COLLINS,
*Plaintiff,*

vs.

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY,
*Defendant.*

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ORDER

[Filed March 15, 1989]

This cause coming up to be heard on the motions of defendant for judgment notwithstanding the verdict or in the alternative for a new trial, upon plaintiff's Exhibit A from the hearing of March 10, 1989, and the argument of counsel on said motions, now upon consideration of the foregoing, the Court bases its below adjudication on the following reasons and factors:

This court omits any citations of law, as the Supreme Court of Alabama is certainly knowledgeable of the law of this state.

The undersigned Judge was the trial Judge and, of course, the Judge who has heard the post-trial matters, and at no time did it appear to the Court that any party in this case received less than a fair and impartial trial before the jury, and no time has it appeared to the

Court that the verdict was a result of bias, passion, prejudice, corruption or other improper motive.

The court observed the attentiveness and apparent understanding by the jurors of the issues and evidence in this case. The court particularly noted, as the Jury could, the testimony of Richard Turek, Senior Field Investigator for Masachusetts Mutual. His reluctance and evasiveness in answering questions was apparent. At the time Mr. William E. Collins justifiably reposed his trust in Massachusetts Mutual's agent, Tom Smart, in May of 1983, he was already a policyholder with Massachusetts Mutual and his original policy had accumulated substantial cash value. A Massachusetts Mutual Life Insurance policy with a face value of $15,000.00 had been in effect since Mr. Collins was 19 years old. This original policy had a low monthly premium and a large cash value as Mr. Turek admitted.

There was sufficient evidence through third party witnesses that the sale of an additional $85,000.00 policy in May of 1983 was represented to Mr. Collins as not involving policy loans. In Plaintiff's Exhibit 1, Mr. Smart, deceased at the time of trial, had represented to an independent third party that the basis of his sale to Mr. Collins was that "In essence, he had $100,000.00 of permanent coverage for $19.51 per month, with no sacrifice in total cash value". Eventually, Mr. Turek admitted that, at the time of the sale and at the time of trial, Mr. Collins did not get an additional $85,000.00 of life insurance for the same low monthly premium with no sacrifice in his total cash value.

The jury also considered Plaintiff's Exhibit 6 which was the agent's statement sent by Mr. Smart to Massachusetts Mutual regarding the sale of the $85,000.00 policy to Mr. Collins. Paragraph 6 of this document clearly shows that the insurance plan to Mr. Collins was not to involve loans and his present policy with Massachusetts Mutual would not be "subjected to borrowing

of loan values." The jury also heard the testimony of Mr. Zadus Turner, a friend of Mr. Collins and a local insurance agent in Mr. Collins' hometown. Turner, Collins and Smart met for lunch and discussed Collins' program. Mr. Turner reviewed illustrations produced by Mr. Smart similar to those attached to Plaintiff's Exhibit 1, but which were "computer generated". Mr. Turner unequivocably stated that had policy loan provisions been included in the plan, as discussed at the luncheon meeting, he would have recalled them (R 61-R 62). From this the jury could conclude, and by their verdict did conclude, that the representations made by Massachusetts Mutual's now-deceased agent, Thomas Smart, were false and deceiving and induced the Plaintiff to purchase additional life insurance which was ultimately funded, that is the monthly payments were made, from existing cash value of his old insurance policy. From the further testimony, including that of Charles Sharp, the jury could reasonably have further concluded that the Defendant's actions were gross, malicious, oppressive and made with the intent of injuring and defrauding the Plaintiff.

The jury could have concluded, and the evidence amply supported such conclusion, that the Defendant's conduct was intentional or reckless and was in furtherance of its ordered corporate policy of updating its old policies which had a guaranteed low interest rate in the event of borrowing against the cash value, by providing a new and higher and more flexible rate and inducing the sale (and resulting commissions) of new insurance by the promise of additional dividends. It is desirable that the Defendant and others similarly situated be discouraged from misleading and deceiving old and new policyholders and members of the public.

Having in mind the above culpability of the defendant's conduct, the undersigned judge finds that the circumstances of this case are probably not that rare an occurrence, and that this defendant (and the life insurance industry) and their agents should be discour-

aged from placing their interests above that of their customers when selling insurance policies. Insurance companies and their agents are in a position to have knowledge and information which the lay person does not have. A purchaser of insurance, such as William E. Collins has a right to rely on the representations of insurance agents and companies, particularly his own life insurance agent and his own life insurance company.

This verdict will not have a negative impact upon the defendant Massachusetts Mutual Life Insurance Company, and that if there would be any impact on innocent third parties, it is of such small significance or consequence that the jury's determination on damages should not be disturbed. This court does not find that the impact of this verdict on this defendant is such that would require a remittitur, nor is any impact of this verdict on other insurance companies likely to have any detrimental effect upon their ability to do business in Alabama.

From the facts at trial, this court was reasonably satisfied that the defendant insurance company was guilty of fraud, deceit or suppression. This court expressly finds and determines that sufficient evidence existed in this case to send the case to the jury, and further expressly finds and determines that the verdict is not erroneous in view of all the evidence that went to this jury.

The above facts relate only a portion of the facts which this Court relies upon to reach its decision on the motions. This Court knows of no reason why there should be any judicial invasion into the function of the jury under the facts in this case. This Court views this jury as a "properly functioning jury". This Court finds nowhere in the record where it is established that the award is excessive because it is based upon bias, passion, prejudice, corruption or other improper motive. This Court finds that the facts that it heard and saw justify a large and substantial award against the defendant.

Therefore, upon consideration of the foregoing, it is ordered and adjudged that the defendant's motions for judgment notwithstanding the verdict or in the alternative for a new trial are hereby denied.

Done this 15th day of March, 1989.

/s/ Carlton Mayhall, Jr.
CARLTON MAYHALL, JR.,
Judge

## APPENDIX C

DOCKET ENTRY

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WILLIAM E. COLLINS

v.

MASSACHUSETTS MUTUAL LIFE INSURANCE CO.

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Circuit Court of Marion County, Alabama

CV-86-166

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Oct. 21, 1988

Trial; this day came Donna Noles and 10 others who, being duly empanelled, on their oaths do say: "We, the Jury, find for the plaintiff Collins and against the defendant Massachusetts Mutual and assess plaintiff's damages at $750,000.00, Foreman, s/Donna Noles." Therefore, it is ordered and adjudged that plaintiff William E. Collins shall have and recover of defendant Massachusetts Mutual Life Insurance Company, a corporation, the sum of Seven hundred fifty-thousand dollars ($750,000.00) together with the cost of this cause, for which if not paid, let execution issue according to law.

/s/ Carlton Mayhall, Jr.
Judge

## APPENDIX D

IN THE CIRCUIT COURT
OF MARION COUNTY, ALABAMA

---

Civil Action No. CV 86-166

WILLIAM E. COLLINS,

*Plaintiff,*

vs.

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY, a corporation,

*Defendant.*

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MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR IN THE ALTERNATIVE FOR A NEW TRIAL

[Excerpts; Filed Nov. 18, 1988]

Comes now Massachusetts Mutual Life Insurance Company and moves the Court to set aside the verdict of the jury heretofore rendered on, to-wit: October 21, 1988 and the judgment of the Court entered thereon and to enter judgment in favor of this Defendant in accordance with its Motion for Directed Verdict or in the alternative, to grant unto Defendant a new trial, and as grounds for said motions, Defendant sets down and assigns the following, separately and severally:

* * * *

50. The imposition of punitive damages in this case violates the due process clause of the Fourteenth Amendment to the Constitution of the United States of America.

* * * *

61. The procedures pursuant to which punitive damages are awarded fail to provide a reasonable limit on the amount of the award against defendant, which thereby violates the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

62. The procedures pursuant to which punitive damages are awarded fail to provide specific standards for the amount of the award of punitive damages which thereby violates the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

* * * *

71. The imposition of punitive damages against this Defendant, on the basis of vicarious liability for the conduct of others, violates the Fifth, Eighth and Fourteenth Amendments of the United States Constitution.

* * * *

## APPENDIX E

### Excerpt From Jury Instructions

* * * *

[R602] Now, "In addition to actual damages or compensatory damages, the law authorizes a jury to award exemplary or punitive, sometimes called 'vindictive' damages in these types of actions," that is, all except the one based on the alternative of mistaken misrepresentation. "If it is shown to the reasonable satisfaction of the jury by the evidence that that fraud or deceit or suppression was malicious, oppressive or gross," if you are reasonably satisfied from the evidence that the defendant was guilty of fraud or deceit or suppression with the exception of the mistaken misrepresentation as charged by the plaintiff, and that such fraud or deceit or suppression was malicious, oppressive or gross and made with the intent to injure and defraud the plaintiff, and the plaintiff did suffer injury or damage as a proximate result of such fraud or deceit or suppression, then in your discretion you may award the plaintiff punitive damages in addition to any actual or compensatory damages you find from the evidence that the plaintiff did suffer.

The law says, "The purpose of awarding punitive or exemplary damages is to allow money recovery to the [R603] plaintiff by way of punishment to the defendant and for the added purpose of protecting the public by deterring the defendant and others from doing such wrong in the future. The imposition of punitive damages is entirely discretionary with the jury. Should you award punitive damages, in fixing the amount you must take into consideration the character and degree of wrong as shown by the evidence in the case and the necessity of preventing similar wrongs."

Now—Again, the punitive damages doesn't apply to the third alternative of the fraud claim of mistaken misrepresentation.

* * * *

## APPENDIX F

### U.S. Constitution, Amend. XIV § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.